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**CEYLEASE FINANCIAL SERVICES LTD.****VS.****SRIYALATHA AND ANOTHER**

SUPREME COURT.

SHIRANI BANDARANAYAKE, J.

AMARATUNGA, J.

MARSOOF, J.

HC COLOMBO 45/2002(1)

SC HC CA 16/2004.

SC CHC (APPEAL) No. 48/2004.

MARCH 15, 2006.

*Stamp Duty Act, sections 24, 31, 33(1), 69 - Guarantee and indemnity - Do they fall within the meaning of a "Bond"?-Deficiency of stamp duty - Could it be rectified ? - When ? - Liability to pay stamp duty on whom ?*

The appellant instituted action against the respondents seeking to recover a certain sum of money based on 3 guarantees and indemnity documents. At the trial when the evidence of the plaintiff's witness was given the plaintiff appellant sought to mark the guarantee and indemnity. This was objected to by the defendant-respondent on the ground that the said guarantee and indemnity have not been property stamped. The High Court after inquiry into the objection upheld the objections of the defendant-respondent.

It was contended by the plaintiff appellant that the guarantee and indemnity sought to be marked was not a Bond.

**HELD :**

- (1) In considering the document in question what is necessary would be to look to the substance of it in order to identify whether that would come within the meaning of a Bond ?
- (2) Guarantee and indemnity given by the defendants - respondents is security for the facility granted in terms of the lease agreement they had entered into. They had entered into an agreement to pay a fixed sum of money at a definite time and thus the said document falls into the meaning of a Bond.
- (3) It is apparent that a bond which is an instrument under seal whereby one person binds himself to another for the payment of a specified sum of money either immediately or at a fixed future date could include a guarantee bond and or indemnity bond.

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**HELD FURTHER:**

- (4) The appellant was entitled to rectify the deficiency of the stamp duty with the payment of penalty.
- (5) Though sufficient time and an opportunity was given to the appellant to rectify the deficiency of stamp duty on the guarantee and indemnity he had not taken any steps in that regard.
- (6) Where an instrument has to be admitted in evidence and if it is not duly stamped the deficiency has to be cured prior to the instrument being marked in evidence.
- (7) The person who draws, makes or executes the relevant instrument pertaining to a lease agreement is the leasing company and therefore under and otherwise there is an agreement to the contrary the liability of paying the stamp duty would be with the leasing company.

*per* Shirani Bandaranayake, J. :

“ It is also to be noted that regulations are made in terms of section 69 of the Stamp Duty Act and the rule of this court is to give effect to the said provisions as it is the bounden duty of any court and the function of every Judge to impart justice within the given parameters.”

**APPEAL** from a judgment of the Commercial High Court of Colombo.

**Cases referred to :**

1. *Yousoof Mohammed and Another vs. Indian Overseas Bank* 1999 3 Sri LR 278
2. *Wickremasinghe and Other vs. Goodwill Marine Academy (Pvt.) Ltd.* 2001 2 Sri LR 284

*Nihal Fernando, PC with Ms. Ruchira Anthony* for plaintiff–appellant  
*Kushan de Alwis with Prasanna de Silva* for 1st and 2nd defendant respondents.  
*Harsha Fernando*, Senior State Counsel for Attorney General as *amicus curiae*

*cur. adv. vult.*

December 11, 2006.

**SHIRANI BANDARANAYAKE, J.**

This is an appeal from the order of the High Court of the Western Province, sitting in Colombo in the exercise of its Civil Jurisdiction (the Commercial High Court) (hereinafter referred to as the High Court) dated 03.08.2004. By that order the learned Judge of the High Court upheld the preliminary objection raised by the defendants-respondents (hereinafter referred to as the respondents) and held that the Guarantee and Indemnity in question cannot be marked in evidence. Being aggrieved by that order the petitioner - appellant (hereinafter referred to as the appellant) appealed to this Court, where leave to appeal was granted on the following questions :

- A. Has the learned Judge of the High Court erred in law and misdirected himself as the Guarantee sought to be marked in evidence does not fall within the words "Bond, pledge and mortgage"?
- B. Has the learned Judge of the High Court erred in law and misdirected himself by totally failing to consider that item No. 7 of Gazette Extraordinary No. 224/3 dated 20.12.1982 as amended by Gazette Extraordinary No. 948/15 dated 06.11.1996 does not deal with Guarantees and/or Indemnities ?
- C. Has the learned Judge of the High Court erred in law by making an order on P2 annexed to the plaint more particularly as P2 is not yet in evidence and has not yet been sought to be marked ?

The facts of this appeal, *albeit* brief, are as follows :

On 15.03.2002, the appellant instituted action against respondents seeking *inter-alia*, Judgment and Decree against the respondents in a sum amounting to Rs. 8,914,834 together with interest in a sum of Rs. 6,642,632 from 19.02.2000 until payment in full (XI). The appellant claimed that the aforesaid amounts were due to it from the respondents based on three (3) Guarantee and Indemnity documents relating to three (3) lease agreements annexed with the plaint marked P2, P7 and P12.

The respondents filed Answer, dated 02.08.2002, seeking *inter-alia*, the rejection and/or dismissal of the action of the appellant (X2).

On 02.03.2004, the matter was taken up for trial, and the Evidence-in-Chief of the witness for the appellant commenced. Upon the producing of Guarantee and Indemnity dated 19.12.1996, through the afore-mentioned witness, the respondents objected to the said document being accepted on the basis that the said Guarantee and Indemnity had not been properly stamped.

Learned Judge of the High Court had inquired into the objection taken by the respondents, upheld the said objections and disallowed the appellant from producing the said Guarantee and Indemnity as evidence.

Since it was common ground that the questions in issue are of public importance and especially deal with the Leasing Industry in the country it was decided to obtain the assistance from the Hon. Attorney General as *amicus curiae*.

Having set down the facts of this appeal, let me now turn to examine the questions of law.

**A. Has the learned Judge of the High Court erred in law and misdirected himself as the Guarantee sought to be marked in evidence does not fall within the words 'bond, pledge and mortgage' ?**

Learned President's Counsel for the appellant contended that Guarantee and Indemnity sought to be marked in evidence was not a bond. He referred to the following paragraph of the Guarantee and Indemnity, in support of his contention, which reads thus :

"..... We the undersigned do and each of us both hereby jointly and severally guarantee the punctual payment by the Lessee of **all rental, interest and all other sums whatsoever due** under the Lease Agreement including any **award taken by the Lessor in any arbitration** commenced under Article 25 of the Lease Agreement and the due performance of all the Lessee's obligations thereunder and we

and each of us further jointly and severally undertake to indemnify you on demand against **all losses, expenses (including legal costs on a full indemnity basis) charges and damages** incurred or suffered by you in consequence of any failure by the Lessee to perform any of the said Lessee's obligations under the Lease Agreement" (emphasis added).

The contention of the learned President's Counsel for the appellant was that a "bond" represents a debt and therefore the document in question is not a bond. Learned President's Counsel referred to the 6th Edition of Black's Law Dictionary, which had defined the word "bond" in the following words in support of his contention :

"A certificate or evidence of a debt on which the issuing company or government body promises to pay the bondholders a specified amount of interest for a specified length of time, and to repay the loan on the expiration date.

In every case a bond represents debt."

He also cited the 14th Edition of Wharton's Law Lexicon, which had defined the word "bond" to read as follows :

"The term 'bond' is also to denote an acknowledgement of indebtedness for a loan obtained by a Government or Company. Bonds contain provisions as to interest until repayment of the principal."

Accordingly, the contention of the learned President's Counsel for the appellant is that for a document to be a bond, it is mandatory that at the time of signing the document the person issuing same owed a specific sum of money or a debt to the person to whom it was issued. Thus the submission for the appellant is that the person issuing the bond should be the debtor himself and not a 3rd party.

On the afore-mentioned basis, learned President's Counsel for the appellant strenuously contended that on a plain reading of P2 and P7, it is apparent that at the time of signing the document, the respondents were not debtors of the appellant and had not agreed to pay a specific sum.

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Learned President's Counsel, further contended that, by P2 and P7 respondents had only—

- (a) guaranteed to the appellant that the lessee will duly perform his obligations under the lease agreement, and
- (b) agreed to indemnify the appellant for all losses, expenses, charges and damages suffered by the appellant due to the lessee's failure to perform his obligations.

In these circumstances, learned President's Counsel for the appellant contended that by P2 and P7, respondents had promised the appellant that they will pay an unspecified sum of money that may be owed in the future by a debtor or a 3rd party in the event of such debtor failing to perform his obligations.

Accordingly, the contention of the learned President's Counsel for the appellant was that P2 and P7 annexed to the plaint were only Guarantees and/or Indemnities and they are not bonds as determined by the learned Judge of the High Court.

Considering the afore-mentioned contention of the learned President's Counsel for the appellant, the question arises as to whether P2 and P7 were only Guarantees and/or Indemnities.

It is not disputed as submitted by the learned Counsel for the respondents that the appellant had instituted action against the respondents on the basis of the Guarantee and Indemnity bonds given by the respondents as security for the facility granted in terms of the several lease agreements.

It is common ground that the document P2 does not contain the word 'bond'. The question that arises therefore is in such circumstances whether the said document, which is a Guarantee and Indemnity would come within the purview of a bond.

The 8th Edition of Black's Law Dictionary (West Publishing Co. 2004, pg. 187), illustrates the meaning of the word 'bond', quite elaborately and reads as follows :

“Bond, n. 1. An obligation; a promise (A)n obligation or in English a ‘bond’, is a document written and sealed containing a confession of a debt; in later times ‘contract’ is the genus; ‘obligation’ the species .....

2. A written promise to pay money or do some act if certain circumstances occur or a certain time elapses; a promise that is defeasible upon a condition subsequent; esp. an instrument under seal by which (1) a public officer undertakes to pay a sum of money if he or she does not faithfully discharge the responsibilities of office, or (2) a surety undertakes that if the Public officer does not do so the surety will be liable in a penal sum.

The Dictionary further states that,

“ The fact that an instrument is called a ‘bond’ is not conclusive as to its character, **It is necessary to disregard nomenclature and look to the substance of the bond itself.** The distinguishing feature of a bond is that it is an obligation to pay a fixed sum of money, at a definite time, with a stated interest, **and it makes no difference whether a bond is designated by that name or by some other, if it possesses the characteristics of a bond.** There is no distinction between bonds and certificates of indebtedness which conform to all the characteristics of bonds” (emphasis added).

Thus it is clear that, in considering the document in question what is necessary would be to ‘look to the substance’ of it, in order to identify whether that would come within the meaning of a ‘bond’.

The contention of the learned President’s Counsel for the appellant was that, at the time of the execution of P2 or P7 no fixed amount of money was agreed as payable by the respondents.

However, it is to be noted that the Guarantee and Indemnity, which the appellant sought to be marked, refers to the lease agreement and stated that,

“ We the under-signed do and each of us doth hereby jointly and severally guarantee the punctual payment by the Lessee

of all rental, interest and all other sums whatsoever due under the Lease Agreement .....

The schedule to the aforesaid lease agreement dated 19.12.1996, clearly gives a breakdown of the payments under that agreement. It thus stated that,

- Item (7) Term of Lease : Thirty Six (36) months from date of Acceptance Receipt
- Item (8) Deposit : Nil  
Prepaid Rent: Nil covering the last Nil months
- Item (9) Thirty Six (36) monthly payments of Rs. 75,962+ 5,318(7%TT) on the 1st day of each month .....**
- Item (10) Rent for renewed Lease : Rs. 2,000
- Item (11) Stipulated Loss Value : 1st Year 1,900,000/-  
2nd year 1,406,000/-  
3rd year 779,000/-  
4th year -
- Item (12) Stipulated Loss Value for Renewed Lease : Rs. 2,000/-
- Item (13) Overdue Interest : (36% per annum) (emphasis added)"

As referred to earlier, a 'bond' could be defined as an instrument, which would make provision for a person to be obliged to pay a fixed sum of money to another at a definite time. A guarantee and/or indemnity also deal with a fixed sum of money that has to be paid by the guarantor at a definite time. with regard to a guarantee and/or indemnity, the fixed sum of money payable by the guarantor could be ascertained on a perusal of the schedule to a lease agreement. Such a schedule would indicate the number of monthly payments and the relevant other payments, which would be due at a fixed period of time. Accordingly the schedule would specifically set out a definite and a certain sum that the guarantor intended to guarantee by a Guarantee and Indemnity. The figures depicted in Item 9 of the schedule to the lease agreement dated 19.12.1996, thus reflects the fixed amount that has to be paid at the given time.

It is thus apparent that by the Guarantee and Indemnity given by the respondents as security for the facility granted to the appellant in terms of the lease agreement, they had entered into an agreement to pay a fixed sum of money at a definite time and thus the said document clearly falls with the meaning of a 'bond'.

In such circumstances, it is evident that the guarantee sought to be marked in evidence clearly falls with the words 'bond, pledge and mortgage.'

In the light of the aforesaid examination, let me now turn to consider the position regarding the provisions in the two (2) Gazette notifications.

**B. Has the learned Judge of the High Court erred in law and misdirected himself by totally failing to consider that item No. 7 of Gazette Extraordinary No. 224/3 dated 20.12.1982 as amended by Gazette Extraordinary No. 948/15 dated 06.11.1996 does not deal with guarantees and/or indemnities ?**

Learned President's Counsel for the appellant submitted at the hearing that item No. 7 of the Gazette Extraordinary No. 224/3 dated 20.12.1982 as amended by Gazette Extraordinary No. 948/15 dated 06.11.1996 applies only in respect of a bond for a 'definite and certain sum of money' and as the Guarantee and Indemnity sought to be produced and marked, does not refer to such a definite and certain sum of money, the provisions of aforesaid Item No. 7 of the Gazette Extraordinary would not apply to the said Guarantee and Indemnity.

Item No. 7 of Gazette Extraordinary No. 224/3 dated 20.12.1982 as amended by Gazette Extraordinary No. 948/15 dated 06.11.1996 reads as follows :

"7(a) Bond, pledge, bill of sale or mortgage for any definite and certain sum of money affecting any property other than any aircraft registered under the Air Navigation Act (Chapter 365) -

- (i) Where such bond, pledge, bill of sale or mortgage is for a sum of money not exceeding Rs. 25,000 – For every Rs. 1,000 or part thereof

(ii) In any other case –

For every Rs. 1,000 or part thereof

- (b) Bond or mortgage whereby any sum of money is hypothecated as security for the due performance of any act or acts or for fulfilling any obligation under any contract or otherwise or indemnifying any person in respect of any damage, loss or expenses, other than a bond referred to in paragraph (c) -

For every Rs. 1,000 or part thereof

- (c) Bond entered into by an exporter with the Director General of Customs as security under a contract in relation to the Manufacture-in -Bond Scheme.”

As referred to earlier, in terms of the Guarantee and Indemnity in question, the respondents had duly stated that they would guarantee the payment of all rentals, interest and other sums due under the lease agreement in the event of any failure by the Lessee to perform any obligation under the lease agreement.

It is to be noted, as correctly referred to by the learned Senior State Counsel and the learned Counsel for the respondents that there are various types of bonds, which have been defined in Black’s Law Dictionary (*supra*). This includes an ‘Guaranty Bond’ as well as an ‘Indemnity Bond’. According to the definition given in Black’s Law Dictionary (*supra*) a ‘Guaranty Bond’ is :

“ A bond combining the features of a fidelity and a surety bond securing both payment and performance.”

Where an Indemnity Bond would mean :

“ A bond to reimburse the holder for any actual or claimed loss caused by the issuer’s or some other person’s conduct.”

Item No. 7 of the Gazette Extraordinary, which was referred to earlier deals with ‘bond, pledge, bill of sale or mortgage’. It is apparent that a bond, which is an instrument under seal, whereby one person binds himself to another for the payment of a specified sum of money either immediately or at a fixed future date (Halsbury’s Laws of England Vol, 12, Pg.556-557, para 1385) could include a Guarantee Bond and/or an Indemnity bond. As

stated earlier it would be necessary to disregard the nomenclature and will have to look into the substance of the bond itself, to find out its identity. Thus considering all the facts and circumstances, it is apparent that, on an examination of the nomenclature of the Guarantee and indemnity in question, it is undoubtedly in law a bond, which would come within Item No. 7 of the Gazette Extraordinary No. 224/3 dated 20.12.1982 as amended by Gazette Extraordinary No. 948/15 dated 06.11.1996.

Learned President's Counsel for the appellant took up the position that, Item No. 7 clearly refers to any 'definite and certain sum of money' and that the Guarantee and Indemnity in question is not for such a definite and certain sum of money.

The details specified in the relevant Guarantee and Indemnity were referred to earlier, and on a perusal of the contents of that document it is evident that the installment payable and the term of the lease are specifically set out in that document and accordingly, there is a definite and certain amount payable by the lessee to the appellant that has been guaranteed by the respondents. As correctly contended by the learned Counsel for the respondents, no reasonable person would enter into an agreement with the intention of defaulting thereon. Therefore the definite and certain sum that the respondents had guaranteed by the Guarantee and Indemnity was the amount that was stated at the time of entering into the lease agreement. Thus the appellant was to receive a sum of Rs. 2,926,080/- (Rs. 75,962/- + Rs.5,318/- per month over a period of 36 months). This would be the definite and certain sum, which had been agreed upon and guaranteed by the respondents on which the stamp duty has to be calculated.

The default interest, which had got accrued will not come within the definition of 'definite and certain sum'. In fact section 17 of the Stamp Duty Act, No. 43 of 1982 (as amended) (hereinafter referred to as the Stamp Duty Act), which deals with the instruments reserving interest had considered this situation, as it has clearly stipulated in that section that the consideration is only on the rental and has disregarded the overdue interest. Section 17 thus stated that,

“Where interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with

stamp duty higher than that with which it would have been chargeable had no mention of interest been made therein.”

Thus it is evident that Item No. 7 of the Gazette Extraordinary No. 224/3 dated 20.12.1982 as amended by Gazette Extraordinary No. 948/15 dated 06.11.1996 does deal with guarantees and/or indemnities.

**C. Has the learned Judge of the High Court erred in law by making an order on P2 annexed to the plaint more particularly as P2 is not yet in evidence and has not yet been sought to be marked?**

Learned President's Counsel for the appellant contended that the order made by the learned Judge of the High Court is in respect of P2 annexed to the plaint and that was not the document, which was sought by the appellant to be marked in evidence and objected to by the respondents. His contention was that, the document, which the appellant sought to mark in evidence was the Guarantee and Indemnity relating to Lease Agreement No. 20100389 DT, which was annexed to the plaint and marked as P7. In the circumstances, learned President's Counsel for the appellant submitted that the order of the learned Judge of the High Court relates only to P2 annexed to the plaint and not to the document P7 and therefore the order of the High Court should be set aside.

It is not disputed that the appellant entered into three (3) lease agreements with the lessee. The three (3) lease agreements, according to the appellant, were marked as P1, P6 and P11.

The three Guarantees and Indemnities were annexed to the aforementioned lease agreements and accordingly P2 was the Guarantee and Indemnity annexed to P1, whereas P7 and P12 were the Guarantees and Indemnities, which were annexed to the two lease agreements marked as P6 and P11, respectively. In all three documents, which were identical, the respondents had entered their names and had signed as the guarantors.

Learned President's Counsel for the appellant contended that the order of the learned Judge of the High Court should be set aside as that order relates to a document, which was never sought by the appellant to be marked as evidence and which was never produced before Court.

I find it difficult to accept this position, since the order of the learned Judge of the High Court clearly relates to all three documents, viz. P2, P7 and P12 and it is obvious that the learned Judge of the High Court had given due consideration to the aforesaid documents before examining the legal position on the preliminary objection taken by the learned Counsel for the respondents. Considering the aforesaid three (3) documents the learned Judge of the High Court had thus stated that,

“විත්තියෙන් ඉදිරිපත් කර ඇති විරෝධතාවය වූයේ පැමිණිල්ල සමග ‘පැ. 02’ වශයෙන් සලකුණු කර ඉදිරිපත් කර ඇති විත්තිකරුවන් දෙදෙනා විසින් අත්සන් තබා ඇති 1997 ජනවාරි මස 09 වන දිනැති බැඳුම්කරය සාක්ෂියක් වශයෙන් ඇතුළත් කර ගැනීමට නොහැකිය යන කරුණයි. මෙවැනිම ලේඛන දෙකක් පැමිණිල්ල සමග ‘පැ. 07’ සහ ‘පැ. 12’ වශයෙන් සලකුණු කර ඉදිරිපත් කර ඇති අතර මෙම විරෝධතාවයම එම ලේඛන සාක්ෂියක් වශයෙන් ඇතුළත් කර ගැනීමේදී ද ඉදිරිපත් වීමට ඉඩ ඇත. ඇත්ත වශයෙන්ම පැමිණිල්ලේ තිහිඳු මහතා ඔහුගේ දේශණ පදනම් කර ගෙන ඇත්තේ ද ඉහත කී ‘පැ. 07’ දරන ලේඛන මතය. මෙම තත්ත්වය යටතේ ඉදිරිපත් කර ඇති විරෝධතාවය සම්බන්ධයෙන් වන නීතිමය තත්ත්වය සලකා බලමි.”

In these circumstances it is evident that the contention of the learned President’s Counsel for the appellant is not tenable.

Learned President’s Counsel for the appellant during the course of the hearing took up the position, relying on section 31 and 33 of the Stamp Duty Act, that the appellant is entitled to rectify the deficiency of stamp duty with a subsequent payment and that he should be allowed to pay the deficit without rejecting the Guarantee and Indemnity in issue.

Section 33(1) of the Stamp Duty Act, deals with the admissibility of a document and/or an instrument and states as follows :

“No instrument chargeable with stamp duty shall be received or admitted in evidence by any person having by law or consent of parties authority to receive evidence or registered or authenticated or acted upon by any person or by any officer in a public office or corporation or bank or approved credit agency unless such instrument is duly stamped.”

The contention of the learned President's Counsel for the appellant is that, even if the document in question is not duly stamped at the time of execution, it could be stamped at a later stage and be admitted in evidence in Court and such admission cannot be questioned, as there is no time period that has been stipulated for the purpose of paying the stamp duty and the penalty for a document, which is insufficiently stamped.

Learned Counsel for the respondent conceded that the appellant was entitled to rectify the deficiency of the stamp duty with the payment of a penalty. However, his position was that the said payment of the penalty should be done **prior to the production of the document** in evidence.

Based on the submissions of the learned President's Counsel for the appellant, two questions have emerged in terms of the provisions of the Stamp Duty Act. The questions thus would be,

- (a) Whether the deficiency in stamping would be fatal to the admissibility of the document in issue; and
- (b) Whether such defect could be regarded as curable ?

With regard to these two (2) questions, learned Senior State Counsel drew our attention to the two (2) decisions of the Court of Appeal by Edussuriya, J.

In the case of *Yousoof Mohamed and Another v Indian Overseas Bank*<sup>(1)</sup> the Court had to consider whether the annexures A1 to A5, which were with the plaint should be rejected, as they were not stamped.

After considering the provisions applicable, the Court of Appeal held that,

- (a) there is no provision which directs the rejection of a plaint, which is not duly stamped or a dismissal of an action on that basis;
- (b) where a plaint is insufficiently stamped due to any annexures, which have been filed as part and parcel of the plaint, not being duly stamped, the Court cannot reject or refuse to entertain the plaint or dismiss the action but must necessarily call for the deficiency in stamps.

Having said that, the Court also was of the view that if there was a failure to supply the deficiency in stamps within a time fixed by Court, the plaint may be rejected. Accordingly it was stated that,

“ However, where a plaintiff fails to supply the deficiency in stamps **within a time fixed by Court**, the plaint may be rejected (emphasis added)”

This position was again considered in *Wickremasinghe and Others v the Goodwill Marine Academy (pvt.) Ltd.*,<sup>(2)</sup> (2001) where the plaintiff-respondent in that matter sought to mark in evidence the bond X2, and objection was taken on the basis that the bond X2 was not duly stamped in accordance with the provisions of the Stamp Duty Act. Considering the applicable provisions of the Stamp Duty Act, the Court held that under the proviso to section 33(1) of the said Act, an unstamped bond may be admitted in evidence upon payment of the proper duty or the amount required to make up the same and a penalty not exceeding three times the proper duty. However, the Court considering the status of the bond in question clearly stated that,

“This had not been done at the time the document was sought to be marked in evidence when the objection was taken. Hence the objection must necessarily be upheld.”

On an examination of the rationale of these two decisions, it is apparent that the Court has considered the applicability of section 33 of the Stamp Duty Act as imperative, but is curable, if attended to in terms of the provisions of the said Act. However, it is also to be borne in mind that the Court had taken the view that an attempt to cure the defect should be done prior to the marking of the document (*Wickremasinghe and Others v The Goodwill Marine Academy (Pvt.) Ltd. (supra)*).

In the light of the aforementioned, let me now consider the circumstances of the present appeal.

It is not disputed that, when this matter was before the High Court, the learned Counsel for the respondent had objected to the admissibility of the Guarantee and Indemnity, as it has not been prepared in terms of

the provisions of the Stamp Duty Act. When this matter came up in the High Court on 02.03.2004, the appellant had moved for a date to make submissions and it had been fixed for 25.03.2004. On that day the appellant had moved for further time and it was fixed for 03.05.2004, on which day again the appellant had moved for further time. On 18.05.2004 appellant moved for time to file written submissions in respect of the objections taken by the respondent.

The steps taken by the appellant in the High Court as stated by the learned Judge of the High Court in his order further indicates that, when the respondent raised the preliminary objection that the appellant had not paid the required stamp duty in terms of the Stamp Duty Act, the learned Counsel for the appellant had moved for time for the payment of the said amount. Thereafter the case had been called on three occasions for that purpose, but at the end of that period learned Counsel for the appellant had submitted that they have affixed sufficient amount of stamps and that there is no necessity to pay any further dues as stamp duty. Accordingly the appellant on 18.05.2004 had moved court for an order on the objections raised by the respondent. Referring to this position learned Judge of the High Court had clearly stated in his judgment as follows:

“එම වගන්තින්හි සඳහන් කරුණු සලකා බලා මෙහි ලේඛනය සම්බන්ධයෙන් කිසියම් මුද්දර ගාස්තු ප්‍රමාණයක් ගෙවීමට ඉතිරිව ඇත්නම්. එය ගෙවීම සඳහා පැමිණිල්ලේ නිරිඳු මහතාම දිනයක් ලබාගෙන ඇත. ඒ සඳහා වන කරුණු ඉදිරිපත් කිරීමට නඩුව ඊට පසු ද අවස්ථා තුනකදී ම කැඳවා ඇතත්. ප්‍රශ්නගත ලේඛනය සම්බන්ධයෙන් කිසිදු හිත මුද්දර ගාස්තු ගෙවීමට නොමැති බවට පැමිණිල්ලෙන් කරුණු ඉදිරිපත් කරමින් සහ ලේඛනයට අලවා ඇති මුද්දර ප්‍රමාණවත් බව පවසමින්. ඒ සම්බන්ධයෙන් තියෝගයක් කරන ලෙස 2004.05.18 වන දින ඉල්ලා ඇත. (emphasis added)”

It is thus quite clear that, although sufficient time and an opportunity was given to the appellant to rectify the deficiency of stamp duty on the Guarantee and Indemnity, he had not taken any steps in that regard.

In such circumstances the question that needs consideration is whether the deficiency of stamps is a curable defect, which can be rectified upon the payment of the outstanding stamp duty and the requisite penalty as provided for under the provisions of the Stamp Duty Act ?

In terms of the proviso to section 33(1) of the Stamp Duty Act, an instrument, which is not duly stamped may be admitted in evidence upon payment of the proper duty with which it is chargeable on the amount required to make up the same and a penalty not exceeding three times the proper duty. The Stamp Duty Act, therefore had made clear provision to cure the deficiency of an instrument, which is not duly stamped, in order for such an instrument to be admitted in evidence. Therefore it is apparent that, if there is a deficiency of stamps in an instrument, that should be regarded as a curable defect that could be rectified upon the payment of the outstanding stamp duty and the required penalty in terms of the provisions of the Stamp Duty Act. In fact, referring to the provisions in the Stamp Ordinance, Lord Goddard, in the Privy Council decision in (*Karunapejjalage Bilindi v Wellawa Attadassi Thero*) (1945) 47 N.L.R. 7) stated that,

“ ..... it would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from an appeal on a ground which is from a practical point of view capable of easy remedy without injustice to anyone.”

I am in complete agreement with the view expressed by the Privy Council, as an objection of purely a technical nature should not be upheld to prevent the course of justice. However, it is also necessary to be borne in mind that, a Court should not allow a process that would pave the way to unwarranted delay, which also would result in thwarting the course of justice.

Accordingly, although it is not specified in the Stamp Duty Act, it would be necessary to consider whether there is a time frame in permitting the payment of the proper duty and the penalty, when an instrument is not duly stamped. Section 33 of the Stamp duty Act, which is referred to earlier, clearly specifies that no instrument chargeable with stamp duty be admitted in evidence, unless such instrument is duly stamped. It is thus evident that, stamp duty should be paid prior to the admission of the relevant instrument. In the circumstances, where an instrument has to be admitted in evidence and if it is not duly stamped, the deficiency has to be cured prior to the instrument being marked in evidence.

In the present case, as stated earlier, the learned Judge of the High Court had granted time for the appellant to cure the deficiency in stamp duty, but the appellant had not taken any steps in this regard.

Learned President's Counsel for the appellant submitted that the Stamp Duty Division of the Department of Inland Revenue had been closed during the relevant period and therefore he was unable to obtain an order from the relevant authority. However, it is apparent that as stated earlier, learned Judge of the High Court after considering the submissions on behalf of the appellant had granted time more than on three (3) occasions for the appellant to pay the proper stamp duty and it is abundantly clear that the appellant had taken no steps to cure the deficit of the stamp duty.

In such circumstances, when ample time and opportunity had been granted to the appellant, quite rightly by the learned Judge of the High court, it would not be possible for this Court to grant further time at this juncture for the appellant to pay the deficit in stamp duty.

Although the Court should be mindful of not permitting mere technicalities to hinder the process of justice, it must also be taken into consideration that unwarranted delay would also necessarily result in thwarting the course of justice. Although it is necessary to grant time in remedying the deficit in stamp duty, that should be done, prior to the relevant instrument/document being marked in evidence and more importantly within the time fixed by the Court.

In the circumstances it is evident that the appellant has failed and neglected to rectify the deficiency in stamp duty paid on the Guarantee and Indemnity and therefore the learned Judge of the High Court was correct in holding that he cannot be allowed to produce and mark the said Guarantee and Indemnity.

There is one other matter I wish to refer to before I part with this Judgment.

Learned President's Counsel for the appellant submitted that if this court holds that the Guarantee and Indemnity is a document subject to stamp duty under item 7 of the Gazette Extraordinary No. 224/3 dated 20.12.1982 as amended by Gazette Extraordinary No. 948/15 dated 06.11.1986, the stamp duty would be a large sum of money the lessee would have to bear thereby burdening the lessee with such stamp duty in addition to the lease rental and taxes, which he is already obliged to pay for the main lease agreement. He further submitted that the guarantors will not accept to be liable to pay a large sum of money as stamp duty.

The person liable to pay stamp duty is clearly stated in the Stamp Duty Act. Section 24 refers to the person liable to pay stamp duty and refers to various categories where as section 24(f) states that,

“ (24) Except where there is an agreement to the contrary, stamp duty shall be payable-

(f) in the case of any other instrument, by the person drawing, making or executing such instrument.”

The person, who draws, makes or executes the relevant instruments pertaining to a lease agreement undoubtedly is the Leasing Company and therefore unless and otherwise there is an agreement to the contrary, the liability of paying the stamp duty would be with the Leasing Companies or the relevant Financial Institutions.

The purpose and the intent of the Stamp Duty Act, is to facilitate the collection of revenue. Therefore when provision is made for the imposition of stamp duty on instruments and documents, it is necessary to adhere to the said provisions although it may seem to be a burden on certain parties. It is also to be noted that, Regulations are made in terms of Section 69 of the Stamp Duty Act and the role of this Court is to give effect to the said provisions as it is the bounden duty of any Court and the function of every Judge to impart justice within the given parameters.

For the reasons aforementioned, I answer the three (3) questions on which leave to appeal was granted in the negative. This appeal is accordingly dismissed and the order of the High Court dated 03.08.2004 is affirmed.

I make no order as to costs.

**GAMINI AMARATUNGA, J.** — *I agree.*

**SALEEM MARSOOF, J.** — *I agree.*

*Appeal dismissed.*